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Supreme Court of the United States

OCTOBER TERM, 1955

No. 438

H. E. WHITE, CHARLES R. HALL, JENNINGS LILLY, W. C. WHITE and JOHN RONCAGLIONE,

Appellants,

vs.

ALBERT ANSON, JR., H. M. BEDDOW, A. S. THOMAS, JR., H. G. KENNEDY and DR. H. R. GLASS, MEMBERS OF THE BOARD OF EDUCATION OF KANAWHA COUNTY, WEST VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATEMENT AS TO JURISDICTION

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APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATEMENT AS TO JURISDICTION

Appellants appeal from the final order of the Supreme Court of Appeals of the State of West Virginia entered May 23, 1955, refusing to issue a writ of mandamus in an original action against the appellees to compel the issuance of a permit to allow appellants to use the school auditorium for a public religious assembly and denying the application "as plainly right." Appellants submit this statement to show that the Supreme Court of the United States has juris-

diction of the appeal and that a substantial question is presented.

OPINION BELOW

No opinion was written by the Supreme Court of Appeals. The only thing that was said by that court appears in the order denying the writ of mandamus "as plainly right." (R. 17)[1] This order appears as Appendix A to this jurisdictional statement.

Application for writ of mandamus was first submitted to Honorable Frank L. Taylor, Judge of the Circuit Court of Kanawha County, West Virginia, at Charleston. (R. 4-9) He refused to issue the writ of mandamus for the reason stated in a letter dated March 12, 1955, addressed to counsel for appellants. (R. 13-15) This unofficial opinion of the Judge of the Circuit Court appears as Appendix B to this jurisdictional statement. (R. 13)

JURISDICTION

This action was brought as an original action in the Supreme Court of Appeals of West Virginia, pursuant to the statutes of West Virginia and the rules of that court. The final order of that court, denying the application for a writ of mandamus, was entered on May 23, 1955. (R. 17) The notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Appeals of West Virginia, on August 10, 1955. (R. 30) The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2). The jurisdiction of the Supreme Court of the United States to review the final order of the Supreme Court of Appeals is sustained by *Matthews* v. *Hamilton,* 320 U. S. 707 (1943); *Williams* v. *Bruffy,* 96 U. S. 176, 183 (1877); *Hamilton* v. *Regents,* 293 U. S. 245 (1934);

[1] Figures within parentheses refer to the typewritten certified transcript of the record on file in the office of the Clerk.

Atchison T. & S. F. Ry. Co. v. *Public Utilities Comm'n,* 346 U. S. 346, 348-349 (1953). Compare *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943).

QUESTIONS PRESENTED

ONE

Where Section 1780 of the Code of West Virginia provides for the use of school property as a civic center and place of public assembly and the appellees, as school board members, are authorized by the statute to permit the use of school property as a place of religious assembly, and do permit the use of the school auditorium for a place of religious assembly by other religious groups, similar to the use proposed by appellants, and appellants apply for the same use of the school auditorium in a timely and proper manner, and which requested use is not inconsistent with school uses or the statutes and Constitution of West Virginia, does Section 1780 of the Code of West Virginia, as construed and applied, violate the constitutional rights of appellants contrary to the First Amendment to the United States Constitution and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution, when the application for the writ of mandamus showed other church organizations were permitted by appellees to make unrestricted use of the school auditorium for religious assemblies, while the same use thereof was denied to appellants?

TWO

In the event that the appellees are not estopped from relying on the separation of church and state clause of the First Amendment to the United States Constitution, because of having discriminated against appellants by allowing other religious organizations to use the civic center auditorium, then there is presented the question of whether such clause of the First Amendment prohibits a religious organi-

zation from making incidental use of public property such as the sidewalks, the streets, the parks and public buildings, by preaching or holding religious assemblies in common with the same use by other groups that are not religious.

STATUTE INVOLVED

Section 1780 of the Code of West Virginia provides as follows:

> "The board of education of any district or independent district shall have authority also to provide for the free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussions, study, recreation and other community activities, and may secure, assembly and house material for use in the study of farm, home and community problems, and may provide facilities for the dissemination of information useful on the farm, in the home, or in the community." (R. 18-19)

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section one of the Fourteenth Amendment to the United States Constitution provides:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Appellants requested the appellees by letter dated January 19, 1955, for the use of one of the high school auditoriums in Charleston, for a religious assembly from 7 to 10 o'clock on some evening convenient to the parties. (R. 10) The application was received by the Board of Education. The board referred it to the attorney for the board for advice on the legal "rights and obligations" of the board. (R. 16) On March 11, 1955, appellees notified appellants that "the Board considered the report of its attorneys relative to the question of whether it had authority to permit the use of school buildings for religious meetings. It is the opinion of the attorneys for the Board that the Board lacks authority to permit the use of school buildings for religious meetings. Therefore, the request of the Jehovah's Witnesses must be declined." (R. 11)

A petition for writ of mandamus was presented to the Honorable Frank L. Taylor, Judge of the Circuit Court of Kanawha County, West Virginia. (R. 4-9) On consideration of the petition he declined, on March 12, 1955, to issue the writ of mandamus "in the absence of a decision by the Supreme Court of Appeals upholding such right." (R. 2, 14) Thereafter, on April 12, 1955, the petition for a writ of mandamus was submitted to the Supreme Court of Appeals of West Virginia. (R. 2-9) That court, on April 18, 1955, denied the application. The court said: "Upon consideration whereof the Court being of opinion that a rule should not be awarded, it is therefore ordered that the same be and it is hereby denied." (R. 1, 25)

Under the rules of procedure of the Supreme Court of Appeals of West Virginia, this was not a final order because

the petition had not been denied "as plainly right." Thereafter, on May 16, 1955, appellants presented to the Supreme Court of Appeals again "their first and second petitions, and notes of argument in support thereof, praying for a writ of mandamus". (R. 17)

In the petition for writ of mandamus that appellants submitted to the Judge of the Circuit Court of Kanawha County, which first petition was submitted also, and resubmitted the second time, to the Supreme Court of Appeals, they alleged discrimination and a denial of equal protection of the law. The appellants alleged in paragraph 12 of such first petition as follows:

> "12. Relators say that the leasing, renting and permitting the use of school property and facilities to other kinds of organizations, groups and individuals, and denying their use to religious groups and organizations, constitutes a denial of the equal protection of the laws, a denial of the right of assembly, a denial of the right of free speech, a denial of equal justice, and constitutes class legislation, in violation of Clause 3, Article VI, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and in violation of Article II, Section 2, and Article III, Sections 1, 2, 3, 7, 11, 15, 16, 17 and 20, of the Constitution of West Virginia, and is a deprivation of religious liberty so guaranteed. It also constitutes a misapprehension of law." (R. 6-7)

Appellants alleged in paragraph 15 of said first petition:

> "That said Kanawha County Board of Education is not consistent in its refusal to permit the use of said school property and facilities by Jehovah's Witnesses because of its contention that it is unlawful to permit such use for religious purposes, as it has been the regular and long

established policy of said Board of Education of Kanawha County to permit other religious organizations and ministers of other religious denominations to use said property and facilities for religious purposes, and to have all senior classes to attend baccalaureate sermons, and to have invocations, prayers and benedictions uttered at commencement exercises and to have ministers of various faiths address high school assemblies and other school meetings and classes in the schools, and to give such prayers before athletic contests, and to have choirs of religious organizations sing religious songs at school assemblies and meetings, and to have teachers' meetings opened with prayer and closed with benedictions, and to permit other religious exercises, and to have school bands and orchestras trained to play religious music, and choral groups to sing religious songs, and to hold Christmas parties and celebrations, and other religious exercises." (R. 7-8)

Attached to said first petition were newspaper clippings and other documents showing a consistent policy of the appellees to allow other organizations to make use of the school auditorium similar to that proposed by the appellants. (R. 25)

In the second petition that was resubmitted to the Supreme Court of Appeals of West Virginia, along with the first petition, appellants alleged that each held "an important official position with Jehovah's Witnesses, commonly denoted a religious organization, engaged in Bible and missionary training for the general public." (R. 18) The position of the appellees as members of the Board of Education was also alleged. Appellants alleged that the appellees were authorized to permit "the use of school buildings as civic centers under the provisions of Section 1780 of the Code of West Virginia." (R. 18)

Appellants alleged in said second petition that appellees

as a common practice rented school auditoriums "to the general public, and to various private organizations . . . and to unions and political parties for meetings, and have established regular rental rates to cover all expenses pertaining to such use." (R. 19)

Appellants also alleged that they had regular meeting places in Kanawha County that met "all ordinary requirements, but that occasionally they desire to hold circuit or regional assemblies attended by members from a wide area and by the general public . . . and that upon such occasions they need to obtain the use of auditoriums accommodating seven hundred or more people." (R. 19)

Appellants alleged that their two applications for use of the Charleston High School auditorium "for one of such area assemblies and Bible lectures" were denied, and that the Board of Education declined said requests on the ground that school buildings could not be used for religious meetings. (R. 20) Appellants then alleged that the attorneys had illegally misinterpreted the Constitution of West Virginia. (R. 20-21)

Appellants alleged that the proposed use of the school auditorium was "an occasional use of public property for a religious meeting" that did not violate the rule of separation of church and state, and that any other interpretation would prevent the use of the auditorium for religious meetings that are "frequently held therein, on the same basis as Jehovah's Witnesses seek to use on rare occasions a school auditorium." (R 21) They alleged that "to deny them the rare occasional use requested would be a violation of the equal protection of the laws, and unlawful class legislation, and an abuse of discretion." (R. 22)

Appellants further alleged that "if Jehovah's Witnesses were permitted to lease a high school auditorium as requested, they would be independent and private contractors, and their use for a Bible lecture would in no sense constitute a joinder of church and state. It would constitute a strictly private use the same as if leased to any of the

other organizations commonly permitted to use such auditoriums." (R. 22-23)

In paragraph 12 of the second petition appellants alleged as follows:

> "12. Relators say that they have complied with all lawful requirements for the use of said school property and facilities, and have been unlawfully denied the use of same, and that said board of education is not consistent in its refusal to permit the use of said school auditoriums by Jehovah's Witnesses, because it has been the regular and long established policy of said Board of Education of Kanawha County to permit other religious organizations and ministers of other religious denominations to use said property and facilities for religious purposes, and to have all senior classes attend baccalaureate sermons, and to have invocations, prayers and benedictions uttered at commencement exercises, and to have ministers of other faiths address high school assemblies, and to give prayers for victory at athletic contests, and to have choirs of religious organizations and denominations sing religious songs at school assemblies, and to have student and teacher meetings opened and closed with invocations, prayers and benedictions, and to permit other religious exercises at schools, and to have high school bands play religious music, and choral groups and choirs sing religious songs, and to hold Christmas parties and celebrations, and other religious exercises." (R. 23)

Appellants then further alleged that "it is the established policy of the State to encourage religious organizations of all denominations" and that thereby provision had been made "to grant tax exemption to religious organizations upon their income, property and holdings." (R. 23-

24) Appellants further alleged that religious activities were "matters of general public interest, . . . and that religion is a proper subject for frequent meetings and associations of the people." (R. 24)

It was affirmatively alleged by appellants that the statute (Section 1780 of the Code of West Virginia) included religious uses within the term "other community activities" used in the statute. (R. 24)

Appellants alleged their original presentation of the petition for writ of mandamus to the Judge of the Circuit Court and his refusal to act thereon. (R. 24) Appellants then alleged the presentation of their first petition to the Supreme Court of Appeals on April 12, 1955, and the denial thereof on April 18, 1955, "without having been refused as plainly right." (R. 25)

Appellants alleged that use of school property under Section 1780 of the Code of West Virginia was not "sectarian use in violation of Federal or State constitutions." (R. 25) They alleged that the use of the school auditoriums as a civic center was similar to "the use of public parks." (R. 25)

In paragraph 15 of their second petition appellants alleged, in part, as follows:

> "Discrimination on the basis of religion is as much forbidden by the United States and West Virginia constitutions as on the ground of race, color, or previous condition of servitude. Under the First Amendment to the United States Constitution there is no discrimination authorized against religious assemblies in favor of other types of assemblies, and interference with assembly constitutes a denial of religious freedom." (R. 25)

Appellants further alleged that to deny the use of school auditoriums for religious assemblies would be a violation of the state and federal constitutions. (R. 26)

In paragraph 20 of their second petition appellants alleged:

> "20. Relators say that said Kanawha County Board of Education has been guilty of unlawful, arbitrary and capricious discrimination, in that they have leased school property on many occasions to religious denominations for religious purposes, and that some of the instances where this has been done include the Thomas Jefferson Junior High School Auditorium regularly to the Christian Science Church; the St. Albans High School Auditorium to the Grace Baptist Church, of St. Albans; the Marmet Junior High School Auditorium to a Methodist Church in Marmet; also for the presentation of the Billy Graham movie, and other religious movies and religious programs." (R. 27)

In paragraph 21 appellants alleged:

> "21. Petitioners refer to the exhibits and affidavits filed with this petition at the end thereof which they believe show conclusively the uses which have been permitted by the defendants of school property and by other officials of other public property and which petitioners believe show definite discrimination on the part of the defendants against said applicants and an unlawful, arbitrary and capricious discrimination." (R. 28)

Appellants in their prayer for relief requested "that a time be fixed with the Court for a full and fair hearing upon the allegations of this petition, and such answers as may be made thereto by said respondents." They also asked in said prayer that the writ of mandamus issue. (R. 28-29)

The above and foregoing second petition for writ of

mandamus was presented as an original action to the Supreme Court of Appeals of West Virginia on May 16, 1955. (R. 17) On May 23, 1955, that court entered a final order which, among other things, reads as follows: "Upon consideration whereof the Court being of opinion that a rule should not be awarded, it is therefore ordered that the same be and it is hereby denied, on this second application, as plainly right." (R. 17)

THE QUESTIONS ARE SUBSTANTIAL

The issues involved on this appeal are similar to those raised in *Ellis* v. *Dixon,* certiorari granted 347 U. S. 926, ordered reargued 348 U. S. 881, certiorari dismissed because improvidently granted 75 S. Ct. 850, 851. In that case this Court said:

> ". . . We approach the matter first by considering what the petitioner has alleged as a basis for the constitutional issues which he asks us to review on the merits.
>
> "The constitutional questions involved are whether respondents, members of the Yonkers Board of Education, in refusing the use of any of the Yonkers public school buildings to the Yonkers Committee for Peace for a forum on 'peace and war,' discriminated against the Committee, so as to deprive the Committee's members of their rights of freedom of speech, assembly, and equal protection of the laws, under the First and Fourteenth Amendments." 75 S. Ct. at page 852.

The appellants here have alleged a plain case of discrimination and a denial of equal protection of the laws contrary to the First and Fourteenth Amendments to the United States Constitution, which were not alleged by the petitioner in *Ellis* v. *Dixon,* 347 U. S. 926. The very same questions that led this Court to grant the petition for writ of certiorari in the *Ellis* case abound here for the holding

that the questions presented are substantial. The identical question was presented in the *Ellis* case. The question was considered substantial enough for this Court to grant the writ in that case. In this case since the same question of discrimination is present the question must, by force of the same reason, be considered substantial enough to support an order noting jurisdiction.

The appellees' contention that the constitutions of West Virginia and the United States prohibit the use of school property for religious purposes is immaterial. Such issue is not involved in this case because appellants allege that the appellees have permitted other religious organizations to make the identical use of the school auditoriums that they have denied to these appellants. Since the appellees have permitted the use that they claim the constitutions prohibit, they are estopped from here asserting that the doctrine of separation of church and state prohibits the use of school premises for religious meetings.—*Wall* v. *Parrot Silver & Copper Company*, 244 U. S. 408, 411-412 (1917); *United Fuel Gas Company* v. *Railroad Commission of Kentucky*, 278 U. S. 300, 307-308 (1929).

In the event that any member of the Court should conclude that the appellees are entitled to urge the doctrine of separation of church and state as a basis for holding that the question here presented is not substantial, then it is necessary to consider the problem. Appellants say that the question presented upon this appeal is nevertheless substantial, notwithstanding the doctrine of separation of church and state under the disestablishment clause of the First Amendment, because such clause does not preclude appellants from using civic center property owned by the state, opened up to the public for public meetings the same as for any other public use.

The principle of separation of church and state that is supported by the disestablishment clause of the First Amendment is confined to direct financial aid to or exclusive appropriation of public property for religious organiza-

tions in the fostering of their principles. The state is precluded from making grants of money or state aid either directly or indirectly to help foster the principles of a religious organization or maintain it. The state is precluded from appropriating any of its public property and devoting it exclusively to use of a religious organization.

The holding of this Court in *McCollum* v. *Board of Education*, 333 U. S. 203 (1948) does not support the position that civic center buildings may not be used as places of public religious assembly by churches and sectarian groups. The decision in the *McCollum* case is not authority against the use of the civic center buildings by appellants. The decision in that case outlawed completely the use of school time and the course of instruction in the public schools given to children as a result of the compulsory education law to teach religious doctrines, creeds and principles. The operation of the state's compulsory education system was found to assist religious instruction carried on by separate religious sects. The situation presented here is "beyond all question [*not*] a utilization of the tax-supported public [property] to aid religious groups to spread their faith."—333 U. S. 203, at page 210.

That the decision in that case was grounded upon and limited to the fact that the use of the property for such instruction became unconstitutional because it was, in effect, a part of the school program, is proved by the opinion of Mr. Justice Frankfurter. He said: "Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. . . . The result is an obvious pressure upon children to attend."—333 U. S. at p. 227.

The issue in the *McCollum* case was limited to the precise problem of utilization of the compulsory education process and school system for religious training. It was not based upon the proposition that public property cannot

be used for the exercise of constitutional rights by religious bodies. If the Court so held it would have so stated explicitly.

The *McCollum* case is not controlling here. If a public civic center building dedicated by law and regulation to community purposes by the appellees cannot be so used by a religious group, then by force of the same reason the public streets could be kept back from use by such religious group. The doctrine of separation of church and state ordained in the First Amendment must not be distorted to itself become an abridgment of liberty. If public streets cannot be withheld from religious organizations for exercise of their constitutional rights of free speech, then by force of the same reason public civic center buildings that are open for community meetings may not be denied to such groups for public meeting purposes.

The argument that the proposed use of the public civic center for the public meeting and the delivery of the talk, which constitutes religious service, is appropriation of public funds is such a slight and inconsequential appropriation as to be unworthy of notice.

The Court is referred to many cases involving the use of public schools for religious assemblies. In the decisions various state courts have held that the slight and incidental use of the school for religious assemblies at times when the school buildings are not used for school purposes is not sectarian use in violation of the Constitution. These holdings were made in decisions rendered prior to the passage of the "Civic Center Acts," which permitted the use of the schools for such purposes throughout the country.—See *Nichols* v. *School Directors,* 93 Ill. 61 (1879); *School Directors* v. *Toll,* 149 Ill. App. 541 (1909); *Hurd* v. *Walters,* 48 Ind. 148 (1874); *Baggerly* v. *Lee,* 37 Ind. App. 139, 73 N. E. 921 (1905); *Townsend* v. *Hagan,* 35 Iowa 194 (1872); *Davis* v. *Boget,* 50 Iowa 11 (1878); *Gibbert* v. *Dilley,* 95 Neb. 527, 145 N. W. 999 (1914); *Greenbanks* v. *Bantwell,* 43 Vt. 207 (1870); *Lagow* v. *Hill,* 238 Ill. 428, 87 N. W. 369 (1909).

This Court has held that the guaranty of freedom of worship that is to be found in the First Amendment to the Constitution of the United States gives the right to Jehovah's Witnesses to carry on their religious service on the public streets. In the many cases that have been before this Court the facts made the basis of the convictions that were reversed showed that Jehovah's Witnesses were conducting religious services. They were preaching the gospel on the public streets. In each case they preached the gospel by means of the printed page rather than by speech. The sermons were printed in pamphlet and book form and distributed upon the public streets. This Court found such activity to be preaching, public worship, public religious service and public religious demonstration.—*Murdock* v. *Pennsylvania,* 319 U. S. 105, 108-109, 110 (1943).

In the *Murdock* case the public worship, religious service and religious demonstrations were carried on from door to door by Jehovah's Witnesses. The fact that such religious service was from door to door, rather than upon the public streets, is of no consequence. The case cannot be distinguished. In fact the Constitution guarantees the right to carry on religious service on the public streets as well as from door to door. This was the holding in *Jamison* v. *Texas,* 318 U. S. 413 (1943); *Busey* v. *District of Columbia,* 319 U. S. 579 (1943); (mandate of this Court executed at 78 App. D. C. 189, 138 F. 2d 592). Cf. *Cantwell* v. *Connecticut,* 309 U. S. 626 (1940); *Marsh* v. *Alabama,* 326 U. S. 501 (1946).

In the decisions just referred to the sermons given by Jehovah's Witnesses were in printed form, magazines, pamphlets and books, upon the public streets. That the sermons delivered by Jehovah's witnesses were printed rather than vocalized does not make any difference. This distribution of printed sermons constituted a religious service and a religious demonstration, which was protected against abridgment by the First and Fourteenth Amendments, according to the holdings of this Court in those cases.

The Court has gone further, moreover, and even held that religious demonstrations in a public park by Jehovah's Witnesses are similarly protected against abridgment under the First and Fourteenth Amendments.—*Niemotko* v. *Maryland,* 340 U.S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953).

In *Saia* v. *New York,* 334 U.S. 558 (1948), an assembly and speech almost identical to this were involved. The ordinance forbidding the use of sound device in the holding of public meetings of any kind in the public park without a permit was held by this Court to be void as construed and applied to the facts and circumstances of the case. The assembly was a religious service by Jehovah's Witnesses in a public park. The religious demonstration by Jehovah's witnesses was protected against the enforcement of the ordinance. See also *Sellers* v. *Johnson,* 8th Cir., 163 F. 2d 877 (1947). The *Sellers* case involved the holding of a religious service in a public park. The Court of Appeals held that the constitutions protected the use of the park by Jehovah's Witnesses against efforts of the officials to prevent such religious service.

If the doctrine of separation of church and state, which is implicit in the First Amendment, forbids the holding of religious service and putting on religious demonstrations on public streets and in public civic center buildings, it seems strange that this Court did not consider such sophisticated doctrine in the following cases: *Lovell* v. *City of Griffin,* 303 U.S. 444 (1938); *Schneider* v. *New Jersey,* 308 U.S. 147 (1939); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Jamison* v. *Texas,* 318 U.S. 413 (1943); *Largent* v. *Texas,* 318 U.S. 418 (1943); *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943); *Jones* v. *Opelika,* 319 U.S. 103 (1943); *Martin* v. *Struthers,* 319 U.S. 141 (1943); *Taylor* v. *Mississippi,* 319 U.S. 583 (1943); *Busey* v. *District of Columbia,* 318 U.S. 579 (1943); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Follett* v. *McCormick,* 321 U.S. 573 (1944); *Marsh* v. *Alabama,* 326 U.S. 501

(1946); *Tucker* v. *Texas,* 326 U.S. 517 (1946); *Saia* v. *New York,* 334 U.S. 558 (1948); *Niemotko* v. *Maryland,* 340 U.S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953).

It would be incongruous and paradoxical indeed to say that the Constitution guarantees freedom of worship and freedom of conscience and at the same time forbids religious service and religious demonstrations in public places.

The United States Constitution guarantees freedom of assembly. No exception of religious assembly was written into the Constitution. If the framers of the Constitution intended to exempt religious assembly from the protection written into the First Amendment they would have written the exemption into the amendment. It is absolutely not permitted for a state, county or city, or their officials, executive, legislative or judicial, to amend the First Amendment by writing into it an exemption or exception that does not appear in the plain language contained in the amendment. If the freedom-of-assembly guaranty in the First Amendment makes secure the right to hold meetings of other kinds in a civic center building it likewise makes secure the right to hold religious meetings therein.

The doctrine of separation of church and state ought properly to be limited to the boundries fixed by the framers of the First Amendment. What the authors of the amendment had in mind was the prohibition of a state church; they intended to exclude any religion from being aided or supported by public funds. The authors of the amendment did not intend to exclude religion from the benefits of the Constitution. In fact, it has been declared that religion occupies a favored position in the law.

Religious services bear burdens that would ordinarily fall directly upon the government. Were it not for their being available the general public would be required to establish welfare institutions and kindred agencies and services. Thus the government would be required to impose additional taxes and make a heavier demand upon the manpower of the nation. The Christian preaching of the gospel

and religious services rendered enjoins upon the people of good will an obligation to conduct themselves uprightly and to be obedient to all proper law. The contribution to the government through the benefits received by the people from the preaching activity of ministers of religion through their religious services and religious demonstrations cannot be equaled by the government were it to undertake such activity. The charitable activities of ministers of the gospel "constitute not only the 'cheap defense of nations' but furnish a sure basis on which the fabric of civil society can rest, and without which it could not endure."—*Trustees of First M. E. Church South* v. *Atlanta,* 76 Ga. 181, 192; *M. E. Church South* v. *Hinton,* 92 Tenn. 188, 190, 21 S. W. 321, 322; *People* v. *Barber,* 42 Hun (N.Y.) 27; *Commonwealth* v. *Y. M. C. A.,* 116 Ky. 711, 76 S. W. 522.

Uniformly the courts have held that a broad and liberal interpretation should be placed upon the provisions of the various statutes, granting favors to religious organizations. —*Trinidad* v. *Sagrada, etc.,* 263 U. S. 578 (1924); *Helvering* v. *Bliss,* 293 U. S. 144 (1934).

It would be unreasonable to suppose or to contend that the framers of the First Amendment had in mind discriminating against the religious organizations in holding public assemblies. The interpretation of the First Amendment contended for by the appellees requires this Court to discriminate against religious assemblies in favor of all other types of assemblies. This Court cannot write into the First Amendment a discrimination against religious assemblies under the guise of the sophisticated doctrine advanced by the appellees, which is an unlawful stretching of the principle of the separation of church and state. A factitious conclusion would be reached by so doing, which is forbidden by the Constitution. Indeed the Court would be discriminating against the religious organizations and misinterpreting the guaranty of freedom of assembly appearing in the First Amendment.

There has been no appropriation of the civic center build-

ing by Jehovah's Witnesses. They have not excluded other organizations from the use of the civic center. Their use of the school auditorium is only incidental and synchronizes with the use of the school as a civic center by all others in Charleston for recreational and other purposes. The so-called appropriation of public funds by use of the civic center by holding of religious meetings is so slight and inconsequential and incidental as to be unworthy of notice by this Court in considering the so-called applicability of the doctrine of separation of church and state.

It is respectfully submitted that the proper holding of this Court should be that religious assemblies stand on the same strong basis under the First Amendment as do assemblies by any other group for any other purpose in a public civic center.

This Court should hold that the use of the civic center for a religious service is proper and within the strong protecting shield of the First Amendment.

The Court should hold and conclude that the disestablishment clause of the First Amendment does not preclude appellants from using civic centers to hold public meetings and delivering Bible sermons to their audiences.

It is submitted that, because of the foregoing argument, it appears that there is no prohibition of the use of civic center buildings by religious organizations for religious meetings. The disestablishment clause of the First Amendment does not command discrimination against religious meetings.

The above discussion shows that the question presented upon this appeal is nevertheless substantial and the Court ought to take jurisdiction to hear the case. Whether the Constitution itself commands that all religious meetings be kept out of civic center meeting places is itself a substantial question that has not been but ought to be determined by this Court in the event that it is concluded that this question is raised in this case by reason of the holdings of the Circuit Judge of Kanawha County and the ruling of the

appellees based on the advice of the attorney for the Board of Education.

This Court denied writ of certiorari in *Greisiger* v. *Grand Rapids Board of Education,* 340 U.S. 820 (1950). Denial of certiorari does not import that this Court approved the ruling of the court below in that case.—*Darr* v. *Burford,* 339 U.S. 200 (1950), also see Mr. Frankfurter's dissent at page 227; *House* v. *Mayo,* 324 U.S. 42, 47-48 (1945).

This Court also dismissed for want of substantial federal question the appeals in *Halvajian* v. *Board of Education,* 341 U.S. 913 (1951); *Lyon* v. *Compton Union High School,* 341 U.S. 913 (1951); *McKnight* v. *Board of Public Education,* 341 U.S. 913 (1951). The action of the Court in those three cases is not dispositive here. An examination of the records in those cases will disclose that there was not a showing that the use permitted by other organizations that had been denied to the appellants in those cases is similar to the use permitted by the appellees in this case. In those cases the record failed to show that other religious organizations were permitted to make the identical use of the civic center properties applied for by the appellants in those cases.

While the proposed use in all of those cases is identical with the proposed use here by the appellants, it is the facts in reference to discrimination by appellees here in allowing other religious organizations to use the property and denying the use to appellants that distinguish those cases from this one.

It becomes unnecessary, therefore, to consider whether the action of the Court in those cases should be followed here. But in the event that it is urged or concluded that the action of the Court in dismissing the appeals in the *Halvajian, Lyon* and *McKnight* cases for want of substantial federal question is applicable here, then they should be reconsidered here. Because of the need to reconsider the ruling in those three cases the jurisdiction of this Court

ought to be noted and the appeal ought not to be dismissed for want of a substantial federal question.

THE QUESTIONS PRESENTED HERE ARE OF GREAT PUBLIC IMPORTANCE

Throughout the entire United States in countless communities public schools are used as places for community assemblies. By law of many states school auditoriums have been thrown open for civic center purposes at all times when the schools are not used for school purposes. In all the other communities where the schools are not opened by law it has been and still is the general practice, without legislative authority, to permit the thousands of school auditoriums to be used as places of assembly for the discussion of community, state and national problems. Religious assemblies are permitted in these schools in thousands of communities the same as any other assembly. This is especially true in rural districts where there are no buildings for religious assemblies.

It has never been generally considered that such use has been prohibited by the separation clause of the First Amendment to the United States Constitution, as is contended by the appellees. Using these schools in the many, many communities for religious purposes are unnumbered persons. Because of the large number of communities affected, the accepted nationwide practice of allowing religious assemblies in public schools and the large number of people involved, the question presented upon this appeal is of very great and nationwide public importance.

The practice that has been indulged in by appellees in this case of discriminating against appellants is of utmost public importance. This presents a question of very great public importance that ought to be determined. It is whether the Kanawha County Board of Education can discriminate against a religious group in violation of the United States Constitution and "get by with it" and have it approved by

the highest state court. This intolerable condition of discrimination in plain defiance of the equal protection clause of the Fourteenth Amendment approved by the State is of itself of great public importance.

If the Kanawha County Board of Education can "get by" with this, then the next step is to permit all the boards of education in West Virginia to discriminate in violation of the United States Constitution. If the school boards of West Virginia can do it, then all the school boards in the country can do it. While the question has not grown up and developed to such great proportion, the fact is that the decision of the court below is merely the beginning of this type of discriminatory encroachment upon constitutional rights. It is not necessary that such illegal discriminatory policy be permitted to grow until it becomes an epidemic throughout the land in order to make it of public importance. The very fact that the mandate is defied in one instance in a state and that such flouting has received judicial approval by the highest court of that state is alone sufficient to make it of public importance.

It is of great public importance to this Court that all beginnings of encroachment to freedom be extirpated or "nipped in the bud." In this connection it is well to consider the words of Justice Sutherland, dissenting in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103 (1937), at page 141:

> "Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was

lost because its possessors failed to stretch forth a saving hand while yet there was time."

CONCLUSION

For the reasons stated it is respectfully submitted that the questions presented by this appeal are substantial and that they are of great public importance so as to justify the noting of jurisdiction and the hearing of oral arguments.

Respectfully submitted,

HAYDEN C. COVINGTON,

Counsel for Appellants.

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County on the 23rd day of May, 1955, the following order was made and entered, to-wit:

State of West Virginia ex rel. H. E. White, Charles R. Hall, Jennings Lilly, W. C. White and John Roncaglione

vs. Mandamus

Albert Anson, Jr., H. M. Beddow, A. S. Thomas, Jr., H. G. Kennedy, and Dr. H. R. Glas , Members of the Board of Education of Kanawha County, West Virgina, as such Board

On a former day, to-wit, May 16, 1955, came again the State of West Virginia at the relation of H. E. White, Charles R. Hall, Jennings Lilly, W. C. White and John Roncaglione, by Horace S. Meldahl, their attorney, and presented to the Court their first and second petitions, and notes of argument in support thereof, praying for a writ of mandamus to be directed against Albert Anson, Jr.,

H. M. Beddow, A. S. Thomas, Jr., H. G. Kennedy, and Dr. H. R. Glass, Members of the Board of Education of Kanawha County, West Virginia, as therein set forth. Upon consideration whereof the Court being of opinion that a rule should not be awarded, it is therefore ordered that the same be and it is hereby denied, on this second application, as plainly right.

APPENDIX B

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
CHARLESTON

FRANK L. TAYLOR
Judge

March 12, 1955.

Mr. Horace S. Meldahl
Attorney at Law
209-210 Davidson Building
Charleston, West Virginia

Dear Mr. Meldahl:

Re: State of West Virginia, upon relation of H. E. White, et al.

vs.

Albert Anson, Jr., et al., Members of the Board of Education of Kanawha County, West Virginia

At the time you presented the application for a writ of mandamus in this matter on last Wednesday, I indicated that because of the full schedule of matters previously set, I would be unable to pass upon your petition in the immediate future. However, since that time a number of these matters have been submitted without further hearings and

arguments thereon; and, therefore, I have found time to presently pass upon your petition.

The question raised by your petition presents an interesting legal problem. However, after careful consideration of the petition and the applicable statute and the decisions bearing upon this question, it is my considered opinion that the petition does not state such a case as to warrant the issuance of the extraordinary writ of mandamus. Such a writ may only be issued when there is a clear legal right to the relief sought, and I do not believe that situation is presented here.

It is well settled in West Virginia that a board of education of a school district is a corporation created by the Legislature, and that it has only such powers as are expressly vested in it by statute or those that fairly arise by necessary implication from the powers expressly given. *Herald* v. *Board of Education,* 65 W. Va. 765; and *Dooley* v. *Board of Education,* 80 W. Va. 648. The only statute relative to the present situation is that part of Code 18-5-19 which reads as follows:

> "The board of education of any district or independent district shall have authority also to provide for free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities, and may secure, assemble and house material for use in the study of farm, home and community problems, and may provide facilities for the dissemination of information useful on the farm, in the home, or in the community."

Although it is clear that the foregoing statute does not expressly provide for the use of school buildings for religious purposes, it may be argued that by implication the statute is susceptible of such an interpretation. This, however, is debatable. It is my considered view that the

statute is not susceptible of the interpretation that the school board may permit school buildings to be used purely for religious purposes. Moreover, to say the least, the matter is so uncertain that, in the absence of a decision by the Supreme Court of Appeals upholding such right, I do not believe that I would be warranted in granting the relief prayed for in this mandamus proceeding, in view of the rule that a writ of mandamus may only be granted when the legal right is clear.

In other states the authorities passing upon this question are divided, some upholding the use of school property for religious purposes and some denying it. In several states the right to use school property for religious purposes is expressly provided by statute. The authorities on this question may be found in an annotation in 5 A. L. R. at pages 886 and 889.

It may be well to observe at this point that even in those states where the statutes expressly provide for the use of school buildings for religious purposes, it is quite generally held that the granting of such use rests largely within the discretion of the school authorities. *School Director* v. *Toll,* 149 Ill. App. 541. See also *Boyd* v. *Mitchell,* 69 Ark. 202, 62 S. W. 61. These decisions furnish additional authority for the inappropriateness of granting the writ of mandamus prayed for herein which, as heretofore indicated, can only be granted in the case of a clear legal right.

It may or may not be advisable to permit school buildings to be used for religious purposes outside of school hours. However, the granting of such right is a legislative and not a judicial function.

I have endorsed my refusal of the writ upon the petition. As you know, it will not be nesessary under such circumstances to have the petition filed in this Court, nor need there be an order entered here showing the refusal

of the relief sought. The original papers with the refusal noted on the petition may be presented to the Supreme Court, if the petitioner be so advised.

Very truly yours,

/s/ Frank L. Taylor
Frank L. Taylor, Judge.

FLT: LB

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No. 438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

H. E. WHITE, CHARLES R. HALL, JENNINGS LILLY, W. C. WHITE, and JOHN RONCAGLIONE,
Appellants,

v.

ALBERT ANSON, JR., H. M. BEDDOW, A. S. THOMAS, JR., H. G. KENNEDY and DR. H. R. GLASS, MEMBERS OF THE BOARD OF EDUCATION OF KANAWHA COUNTY, WEST VIRGINIA,
Appellees.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPELLEES' MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss the appeal herein and in support of such motion respectfully show the following:

I. STATEMENT OF THE ISSUES ON APPEAL

The question sought to be presented by this appeal is the appellants' claim that the refusal of The Board of Education of the County of Kanawha, a public corporation created under general law by the Legislature of West Virginia, to grant them permission to use a public school building for a religious meeting of a religious sect to which appellants belong, known as Jehovah's Witnesses, violates the constitutional rights of appellants contrary to the First Amendment to the Constitution of the United States and the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

Appellants also claim that the refusal of The Board of Education of the County of Kanawha to permit the use of school property and facilities by religious groups and organizations while permitting their use by other groups and organizations, constitutes a denial of the equal protection of the laws, a denial of the right of assembly, a denial of the right of free speech, a denial of the right of equal justice, and constitutes class legislation in violation of the Constitution of the United States and the First, Fifth and Fourteenth Amendments thereto as well as certain provisions of the Constitution of the State of West Virginia.

The appellants further alleged in their petition presented to the Circuit Court of Kanawha County, West Virginia, and to the Supreme Court of Appeals of West Virginia that under the provisions of section 19, article 5, Chapter 18 of the Code of West Virginia, 1931, (Michie's West Virginia Code of 1955, section 1780) county boards of education "are authorized by statute to permit the use of school property as a place

of religious assembly"; that "The use of school buildings as civic centers under the provisions of Section 1780 of the Code of West Virginia" is permitted; that the attorneys of The Board of Education had illegally misinterpreted the Constitution of West Virginia; that the term "other community activities" used in the statute includes religious uses, such as religious meetings and services of sects similar to Jehovah's Witnesses to which appellants belong.

These allegations raise the following non-federal questions:

(1) May a county board of education permit the use of public school buildings for purely religious purposes under West Virginia law?

(2) Do the provisions of Section 15, Article 3 of the Constitution of West Virginia prohibit the use of public school buildings as places of religious worship or for religious meetings and services?

II. THE QUESTIONS SOUGHT TO BE RAISED CANNOT BE MADE THE BASIS OF APPEAL

Under 28 U.S.C.A. section 1257 the judgment or decree of the highest court of the state may be reviewed by the Supreme Court of the United States by appeal:

(1) Where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) Where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws

of the United States, and the decision is in favor of its validity.

This attempted appeal does not involve the validity of a treaty or statute of the United States. Consequently, in order that there may be jurisdiction to review the judgment of the Supreme Court of Appeals of West Virginia, there must be drawn in question in this case the validity of a statute of the State of West Virginia on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the judgment of the Supreme Court of Appeals of West Virginia must be in favor of its validity.

The only statute of the State of West Virginia involved in this case is section 19, article 5, Chapter 18 of the Code of West Virginia, 1931, as amended, (Michie's West Virginia Code of 1955, section 1780), which defines and enumerates the uses and purposes, other than school purposes, for which public school buildings may be used. It provides:

> "The board of education of any district or independent district shall have authority also to provide for the free, comfortable and convenient use of school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities, and secure, assemble and house materials for use in the study of farm, home and community problems, and may provide facilities for the dissemination of information useful on the farm, in the home, or in the community."

The appellants do not contend that this statute is invalid on the ground that it is repugnant to the Constitution, treaties or laws of the United States. On

the contrary, appellants in their petition to the State Court urged this statute as authorizing county boards of education in West Virginia to permit the use of public school buildings for religious meetings and services. The real objection of the appellants is the claimed unconstitutionality of the result obtained by the use of the statute, not the unconstitutionality of the statute itself. They assert, rather, that there has been systematic discrimination against them in the administration of the statute by The Board of Education of the County of Kanawha in that the Board of Education has permitted other religious organizations to use public school buildings for meetings and services while denying them the same use. To this effect are the allegations in paragraphs 12, 20, and 21 of appellants' petition to Supreme Court of Appeals of West Virginia. (See pages 23, 27 and 28 of the typewritten transcript of the record filed with the Clerk.) Such an averment has uniformly been held not to draw in question the validity of the statute. Thus, an appeal will not lie. *Zucht* v. *King*, (1922) 260 U. S. 174, 67 L. Ed. 194; *Charleston Federal Savings & Loan Association* v. *Alderson*, (1944) 324 U. S. 182, 185, 89 L. Ed. 857; *Jett Bros. Distilling Co.* v. *Carrollton*, (1919) 252 U. S. 1, 64 L. Ed. 421. In *Zucht* v. *King*, (1922) 260 U. S. 174, 67 L. Ed. 194, the Court said:

> "The bill contains also averments to the effect that, in administering the ordinance, the officials have discriminated against the plaintiff in such a way as to deny to her equal protection of the laws. These averments do present a substantial constitutional question. *Neal* v. *Delaware*, 103 U. S. 370, 26 L. Ed. 567. But the question is not of that character which entitles a litigant to review by this court on writ of error. The

> question does not go to the validity of the ordinance; nor does it go to the validity of the authority of the officials . . . . This charge is of an unconstitutional exercise of authority under an ordinance which is valid."

At no point was the validity of the statute attacked in the state courts. For appeal to lie the validity of the statute must be drawn in question. The assertion of a right, privilege or immunity under the Federal Constitution affords no basis for appeal from a state court. *Mergenthaler Linotype Co.* v. *Davis*, (1919) 251 U. S. 256, 64 L. Ed. 255.

III. THE JUDGMENT OF THE STATE COURT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

Under the West Virginia statutes governing the procedure to be followed in proceedings for mandamus, the relator or petitioner files his petition with the circuit court of the county having jurisdiction of the matter praying that a rule be issued against the defendants to show cause why a rule in mandamus should not issue. No process is issued against the defendants named in the petition and the petition of the relator is considered *ex parte*. If the court is satisfied that the relator has stated a *prima facie* case in his petition, i. e., that there is a clear right to relief sought, a rule to show cause is issued and served upon the defendants. After the service of the rule upon them, the defendants may appear and plead. If the court is of the opinion that the petition does not state a case warranting the issuance of the extraordinary writ of mandamus, the refusal of the relief sought is endorsed on the petition. The relator may then present the petition together

with the court's refusal endorsed thereon to the Supreme Court of Appeals. See Article 1, Chapter 53 of the Code of West Virginia, 1931, as amended. The procedure followed in the Supreme Court of Appeals is the same as in the circuit court. The petition is again considered *ex parte* and the writ issued or refused.

In passing upon the appellants' petition, the Circuit Court of Kanawha County held:

> "It is well settled in West Virginia that a board of education of a school district is a corporation created by the Legislature, and that it has only such powers as are expressly vested in it by statute or those that fairly arise by necessary implication from the powers expressly given. *Herald* v. *Board of Education*, 65 W. Va. 765; and *Dooley* v. *Board of Education*, 80 W. Va. 648. The only statute relative to the present situation is that part of Code 18-5-19 which reads as follows:
>
> "The board of education of any district or independent district shall have authority also to provide for the free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities, and may secure, assemble and house material for use in the study of farm, home and community problems, and may provide facilities for the dissemination of information useful on the farm, in the home, or in the community."
>
> "Although it is clear that the foregoing statute does not expressly provide for the use of school buildings for religious purposes, it may be argued that by implication the statute is suscepti-

> ble of such an interpretation. This, however, is debatable. It is my considered view that the statute is not susceptible of the interpretation that the school board may permit school buildings to be used purely for religious purposes. Moreover, to say the least, the matter is so uncertain that, in the absence of a decision by the Supreme Court of Appeals upholding such right, I do not believe that I would be warranted in granting the relief prayed for in this mandamus proceeding, in view of the rule that a writ of mandamus may only be granted when the legal right is clear."

The Supreme Court of Appeals likewise denied appellants' petition for a writ of mandamus but without stating any ground for its decision. The constitutional objections raised by the appellants were not expressly passed on by the Supreme Court of Appeals of West Virginia.

The allegations of the petition effectively raise questions of state law relating to the power and authority of county boards of education to permit nonscholastic uses of public school buildings other than those enumerated and authorized by statute.

The Circuit Court of Kanawha County did not pass upon the constitutional questions which appellants attempted to raise, but decided the cause upon a nonfederal basis, namely, the lack of statutory authority in a board of education to permit school buildings to be used for purely religious meetings.

It is well settled in West Virginia that a county board of education is a corporation created by the Legislature, and that it has only such powers as are

expressly conferred upon it by statute or those that fairly arise by necessary implication from the powers expressly given. *State* v. *Rouzer*, (1945) 127 W. Va. 392, 32 S. E. (2d) 865; *Shinn* v. *Board of Education*, (1894) 39 W. Va. 479, 20 S. E. 604; *Honaker* v. *Board of Education*, (1896) 42 W. Va. 170, 24 S. E. 544; *Dooley V. Board of Education*, (1917) 80 W. Va. 648, 93 S. E. 766; *Madachy* v. *Huntington Horse Show*, (1937) 119 W. Va. 54, 57, 192 S. E. 128; *Herald* v. *Board of Education*, (1909) 65 W. Va. 765, 65 S. E. 102; *State ex rel. Town of South Charleston* v. *Partlow*, (1949) 133 W. Va. 139, 55 S. E. (2d) 501.

In *Herald* v. *Board of Education*, 65 W. Va. 765, 65 S. E. 102, the court held in point 2 of the syllabus:

> "A board of education is a *quasi* corporation, existing only under statute, having only the powers given by statute and such implied powers as are absolutely necessary to execute such express powers. It cannot engage in business or make contracts outside its functions touching education. It cannot lease a school house lot for production of oil and gas."

And in *State ex rel. Town of South Charleston* v. *Partlow*, 133 W. Va. 139, 161, 55 S. E. (2d) 501, it was held:

> "The board of education of a school district is a corporation created by statute with function of a public nature expressly given and no other. It can exercise no power not expressly conferred or fairly arising by necessary implication, and in no other mode than that prescribed or authorized by the statute."

In the absence of express statutory authority, then the Board of Education is without power or authority

to permit the use of school buildings by religious groups for the purpose of worship or teaching or expounding their particular beliefs. The only statute relating to the uses and purposes, other than school purposes, for which a school building may be used is section 19, article 5, of Chapter 18 of the Code of West Virginia, 1931, as amended. It provides:

> "The board of education of any district or independent district shall have authority also to provide for the free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities, and may secure, assemble and house material for use in the study of farm, home and community problems, and may provide facilities for the dissemination of information useful on the farm, in the home, or in the community."

This statute contains no express grant of authority to boards of education to permit the use of school buildings for meetings of religious sects. In fact, it is the intent of the statute to limit the purposes, other than school purposes, for which school buildings may be used to "community activities" in the nature of discussion, study and recreation. The fact that this statute enumerates the purposes, other than school purposes, for which a school building may be used and does not include meetings of religious sects, would imply by application of the doctrine *expressio unius est exclusio alterius* that such a use is prohibited. See *State* v. *Simms*, (W. Va. 1953) 77 S. E. (2d) 122; *Taylor* v. *Taylor*, (1909) 66 W. Va. 238, 66 S. E. 690; *Bischoff* v. *Francesa*, (1949) 133 W. Va. 474, 56 S. E. (2d) 865; *Harbert* v. *County Court of Harrison County*,

(1946) 129 W. Va. 54, 64, 39 S. E. (2d) 186. The doctrine of *expressio unius est exclusio alterius* has been held to be especially applicable to the construction and interpretation of statutes. *Tate* v. *Ogg*, (1938) 170 Va. 95, 195 S. E. 496.

The present statute, section 19, article 5, of Chapter 18 of the Code of West Virginia, 1931, was first incorporated into the general law of West Virginia by Chapter 2, Acts of the Legislature, 1919, and then was carried into the Code of West Virginia, 1931, as section 19, article 5, Chapter 18. Said Chapter 2, Acts of 1919, was entitled "An act to amend and re-enact Chapter 45 of the Barnes Code of 1916" and by said act of 1919 the whole of Chapter 45 of the Code of 1916 relating to education and schools was revised. Section 62, of Chapter 45 of the Barnes Code of 1916 provided as follows:

> "The trustees may allow the school house in their charge to be used for holding religious, political, or literary meetings and Sunday school and such other meetings as may be considered beneficial to the public generally, under such regulations for the care and cleaning thereof as they may prescribe; provided, that such meetings shall not interfere with the public schools."

Thus, prior to the enactment of the present statute the use of school buildings for religious and political meetings was expressly authorized. The statute also expressly permitted the holding of Sunday school. However, in revising this statute the Legislature of West Virginia saw fit to withdraw religious meetings from the purposes, other than school purposes, for which school buildings might be used and omitted religious

meetings from the enumeration in the statute. The omission of religious meetings as one of the purposes for which school buildings might be used is clear and convincing evidence of the intention of the Legislature of West Virginia to withdraw the statutory authority of a board of education to permit such use. *J. S. Taylor* v. *State Compensation Commissioner et al*, (W. Va. 1955) 85 S. E. (2d) 114. In this case it was held:

> "When parts of a prior statute are omitted from a later statute which revises the prior statute, the parts omitted are not to be revived by construction but are to be considered as annulled."

See also to the same effect *State* v. *Hinkle*, 129 W. Va. 393, 41 S. E. (2d) 107; *Elite Laundry Company* v. *Dunn*, 126 W. Va. 858, 30 S. E. (2d) 454; and *Grant* v. *Baltimore & Ohio Railroad Company*, 66 W. Va. 175, 66 S. E. 709.

From these rulings of the Supreme Court of Appeals of West Virginia as to the interpretation of the statute, it is clear that section 19, article 5, of chapter 18 of the Code of West Virginia, 1931, does not authorize a county board of education to permit the use of public school buildings in its charge for religious meetings and services. The Board of Education of the County of Kanawha could not, therefore, lawfully permit the use of school buildings under its control for meetings of religious sects nor grant such permission to appellants.

It is also well settled in West Virginia that mandamus will not be awarded to require the person to whom it should be directed to perform any act which he is without authority to perform. *State* v. *Mills*,

(1949) 132 W. Va. 580, 588-9, 53 S. E. (2d) 416; *State ex rel the City of Huntington* v. *George R. Hefley*, (1944) 127 W. Va. 254, 271, 32 S. E. (2d) 456; *Pardue* v. *County Court*, (1928) 105 W. Va. 235, 239, 141 S. E. 874; *State ex rel. Kelly* v. *State Road Commission*, (1926) 102 W. Va. 88, 132 S. E. 465. In the latter case it was held:

> "Mandamus will only go to protect a clear legal right, and will never lie to compel the performance of an act prohibited by law."

The same rule is recognized in *Ex Parte Rowland*, (1881) 104 U. S. 604, 612, and *Laclede Gas Light Company* v. *Murphy*, (1897) 170 U. S. 78, 95. In the latter case the Court said:

> "Mandamus lies to compel a party to do that which it is his duty to do, but can confer no new authority, and the party to be coerced must have the power to perform the act."

The judgment of the Circuit Court of Kanawha County, West Virginia, was expressly based upon this ground as evidenced by his opinion incorporated as appendix B to the appellants' jurisdictional statement filed herein. The Supreme Court of Appeals might likewise have rested its opinion upon the nonfederal ground that these appellants had shown no clear right to the relief sought.

It would also appear that under the Constitution of West Virginia the use of school houses as places of public worship or for religious meetings or services is prohibited. Section 15, Article 3, of the Constitution of West Virginia provides:

> "No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever; nor shall any man be forced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief, but all men shall be free to profess, and by argument to maintain their opinions in matters of religion; and the same shall, in no wise, affect, diminish or enlarge their civil liberties; and the Legislature shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this state, to levy on themselves, or others, any tax for the erection or repair of any church for public worship, or for the support of any church or ministry, but it shall be left free for every person to select his religious instructor, and to make for his support, such private contracts as he shall please."

There is an apparent split of authority on the question as to whether such a constitutional provision prohibits the use of school buildings for religious meetings. The majority rule, however, denies the use of school buildings for religious purposes in the face of such provisions. *Spencer* v. *Joint School District*, (1875) 15 Kan. 259, 22 Am. Rep. 268; *George* v. *Second School District*, (1843) 6 Met. (Mass.) 510; *Dorton* v. *Hearn*, (1878) 67 Mo. 301; *Hysong* v. *Gallitzin School District*, (1894) 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632; *Bender* v. *Streabich*, (1896) 17 Pa. Co. Ct. 609, affirmed 182 Pa. 251, 37 Atl. 853; *Spring* v. *School Directors*, (1900) 31 Pitts, L.J.N.S. (Pa.) 194.

In *Spencer* v. *School District*, 15 Kan. 259, 22 Am.

Rep. 268, it was held that the use of a public school house for even one religious or political gathering is illegal, since taxation is invoked to raise funds to erect the buildings, and taxation, being illegitimate to provide for any private purpose, will not lie to raise funds to build a place for a religious society, a political society, or a social club, and what cannot be done directly cannot be done indirectly.

In *State ex rel. McCollum* v. *Board of Education*, (1947) 333 U. S. 203, 92 L. Ed. 649, and *Everson* v. *Board of Education*, (1947) 330 U. S. 1, 91 L. Ed. 711, this Court stated that the use of tax-supported property for religious instruction is barred by the First Amendment. As stated in the Everson case, "No tax in any amount, large or small, can be levied to support any religious activities or institutions."

In *Herald* v. *Board of Education*, 65 W. Va. 765, 767, 65 S. E. 102, Judge Brannon, speaking for the court, had this to say on the subject of permitting school buildings to be used for religious purposes:

> "I quote the following from Spelling on Extra. Relief, sec. 648: 'The letting of property belonging to a municipal corporation for any unauthorized uses will be enjoined at the suit of resident tax payers; and the use of a school house for religious worship, when not expressly authorized, is held to warrant the granting of an injunction to restrain the officers of the school district from permitting such use at the suit of a tax payer, without his showing special damage, since he is without means of redress at law. School officers may be enjoined from leasing a public school house for the purpose of keeping a private school, and the use of a public school

> house for private purposes, such as the holding of religious or political meetings, social gatherings and the like, is unauthorized by law and may be restrained at the instance of any party injured thereby; and this, though a majority of the electors and taxpayers of the District assent to such use and an adequate rental is paid therefor; and it is immaterial in such case that the majority of the citizens and the Directors of the District have consented to the illegal use.' "

While it is true that Judge Brannon's statements in this regard may be considered as *obiter dicta*, yet they are an expression of the attitude of the Supreme Court of Appeals of West Virginia on the subject, and are indicative of the tendency of that court to follow the majority rule expressed in *Spencer* v. *School District*, 15 Kan. 259, 22 Am. Rep. 268.

There is yet another non-federal basis upon which the state court's decision might have rested. This proceeding in mandamus was instituted by the appellants against the individual members composing The Board of Education of the County of Kanawha. By section 5, article 5, of Chapter 18, of the Code of West Virginia, 1931, county boards of educations are made corporations and as such corporations must sue and be sued, plead and be impleaded. The statutory name of the Kanawha County Board of Education is "The Board of Education of the County of Kanawha". When a board or body of school officials is made a corporation by corporate name, suits against it on causes of action relating to school affairs must be in the corporate name. *Halliday* v. *Marchington*, 44 Ohio App. 132, 184 N. E. 698; *Johnson V. Common School District No. 13*, 38 S. W. 861, 18 Ky. L. 387; *Reynolds* v. *Foster*, 66 Misc.

133, 123 N.Y.S. 273; *Butman* v. *Jones*, (Tex. Civ. App.) 24 S. W. (2d) 796. This rule likewise applies to mandamus. *Jenkins Bros. Shoe Company* v. *Travis*, 168 N. C. 589, 845 E. 1036. The appellees had no opportunity to raise this question in the state court since all proceedings below were *ex parte*.

Where both federal and non-federal questions are properly raised in the record but no opinion is delivered by the highest state court in rendering its judgment or the opinion is ambigious, the Supreme Court ordinarily presumes the decision is based on a non-federal ground raised in the record which may be adequate to support it. This presumption grows out of the principle that there must be some affirmative showing in the record that a federal question was presented to the state court and that a decision on such question was necessary to a determination of the cause. When this is not clearly indicated, especially because of the presence of an adequate non-federal ground, the Court has declined jurisdiction. *Lynch* v. *New York at the Relation of Pierson*, (1934), 293 U. S. 52, 54, 79 L. Ed. 191; *Adams* v. *Russell*, (1912) 229 U. S. 353, 358, 57 L. Ed. 1224; *Woods* v. *Niersthiemer*, (1945) 328 U. S. 211, 90 L. ed. 1177; *Phyle* v. *Duffy*, (1947) 334 U. S. 431, 92 L. Ed. 1494; *Williams* v. *Kaiser*, (1944) 323 U. S. 471, 477, 89 L. ed. 398.

While a federal question may be raised in this record, a non-federal question is likewise raised which is adequate to support the judgment of the state court. It is quite apparent from the opinion of the Judge of the Circuit Court of Kanawha County, that his decision was based upon the lack of authority of The Board of Education to do what appellants seek to compel ap-

pellees to do. There being an independent non-federal question sufficient to sustain the judgment of the Supreme Court of Appeals and the Supreme Court of Appeals not having stated the grounds for its decision, the Court will not take jurisdiction. *Lynch* v. *People of New York on Relation of Elizabeth Pierson*, (1934) 293 U. S. 52, 79 L. Ed. 199; *Williams* v. *Kaiser* (1944) 323 U. S. 471, 477, 89 L. Ed. 398. In the latter case the Court said:

> "It is suggested, moreover, that for all we know the denial of the petition by the Supreme Court of Missouri rested on adequate state grounds. It is a well established principle of this court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Honeyman* v. *Hanan*, 300 US 14, 18, 81 L. Ed. 476, 478, 57 S. Ct. 350;*Lynch* v. *New York*, 293 US 52, 79 L ed 191, 55 S Ct 16. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the court will not undertake to review it. *Klinger* v. *Missouri*, 13 Wall. (US) 257, 263, 20 L ed 635, 637; *Walter A. Wood Mowing & Reaping Mach. Co.* v. *Skinner*, 139 US 293, 297, 35 L. Ed. 193, 195, 11 S Ct 528; *Allen* v. *Arguimbau*, 198 US 149, 154, 155, 49 L. ed 990, 993, 25 S CT 622; *Lynch* v. *New York* 293, US 52 L ed 191, 55 S Ct 16, supra. We adhere to those decisions."

IV. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The appellees deny that any substantial federal question is presented by this appeal.

The appellants vaguely contend that under the provisions of the First and Fourteenth Amendments to the Constitution of the United States they are entitled to use public school buildings as a place of worship and rely upon such cases as *Murdock* v. *Pennsylvania*, 319 U. S. 105, upholding the right to distribute religious pamphlets in the streets; *Jamison* v. *Texas*, 318 U. S. 413, relating to the right to distribute religious literature from door to door; *Niemotko* v. *Maryland*, 340 U. S. 268 and *Fowler* v. *Rhode Island*, 345 U. S. 67, involving the right to hold a religious demonstration in a public park. Each of these cases may be distinguished from the present case. No one of these cases involved the right to use a public school building for religious meetings or services. In each case there was no contention that religious meetings could not be lawfully held in the streets and parks if proper permits were first obtained. However, the statutes requiring the license or permit specified no grounds for the refusal of the permit and set up no standards by which the licensing authority was to be guided.

These appellants do not seek to use public streets or public parks for the purpose of holding a religious meeting but assert a constitutional right to use the public school buildings of Kanawha County for the purpose of conducting their religious meetings and services therein. Boards of education were created by the Legislature with the idea that they should carry out an act

included within the governmental power, i. e., the education of the children of the county. Each county board of education may acquire property which is to be used only for the purposes germane to the object for which it is created. *Herald* v. *Board of Education*, (1909) 65 W. Va. 765, 771, 65 S. E. 102. Religious meetings cannot be considered among the purposes for which a public school building is erected.

The appellants in their jurisdictional statement ignore the plain meaning of the West Virginia statute and, in an effort to bring in *Murdock* v. *Pennsylvania*, *Jamison* v. *Texas*, *Niemotko* v. *Maryland*, *Fowler* v. *Rhode Island*, and other cases involving the right of Jehovah's Witnesses to distribute their literature, have attempted to transform public school buildings into "public civic center buildings" open to all who may desire to use them for all purposes.

There is no inherent right in any citizen or in any group or religious organization to use school buildings for any other purposes than those devoted to public schools. The Legislature of West Virginia may prohibit all nonscholastic uses of school buildings or may permit only certain classes of organizations to make nonscholastic use of such buildings. *Baggerly* v. *Lee*, (1905) 37 Ind. App. 139, 73 N. E. 921; *Coughlin* v. *Chicago Park District*, (1936) 364 Ill. 90, 4 N. E. (2d) 1, 9; *State ex rel. Griesinger et al* v. *Grand Rapids Board of Education*, 88 Ohio App. 364, 100 N. E. (2d) 294, appeal dismissed 153 Ohio St. 474, 93 N. E. (2d) 393, certiorari denied 71 S. Ct. 51, 340, U. S. 820, 95 L. Ed. 603, rehearing denied 71 S. Ct. 733, 341 U. S. 917, 95 L. Ed. 1353; *Davis* v. *Massachusetts*, (1896) 167 U. S. 43, 47, 42 L. Ed. 71. The First

Amendment does not guarantee to everyone the right to use any public place at any time for discussion and instruction. *Poulos* v. *New Hampshire*, 345 U. S. 395, 405, 97 L. Ed. 1105. The Fourteenth Amendment does not have the effect of creating a right in a citizen to use public property in defiance of the constitutions and laws of the state. *Davis* v. *Massachusetts*, 167 U. S. 43, 47, 42 L. Ed. 71.

The use of public funds or property for religious purposes can never be considered slight or inconsequential as appellants' state. If these appellants are entitled to use the public school buildings for their religious services, by force of the same argument all other religions, religious groups and sects must be given the same right. The appropriation of public school buildings to religious use then becomes a very great burden. Any religious group or sect could demand the right to use the public school buildings at any time they were not being used for school purposes. This certainly would amount to the use of tax supported public school buildings for religious purposes. The Legislature of West Virginia apparently foresaw the possibility of such a result and in 1919 when it revised the school law withdrew from county boards of education the power and authority to permit the use of public school buildings for religious meetings. The question here is not one of discrimination but of legal right under state law, whether a board of education has the power and authority under state law to grant appellants' demand. Clearly it does not have that power and authority. No substantial federal question thus exists.

The West Virginia statute is not discriminatory. It simply defines and enumerates the nonscholastic uses

to which school buildings may be put. The right of any person or organization to use the public school buildings for nonscholastic purposes is not granted or denied upon the basis of any religious test or upon the basis of the particular beliefs of that person or organization. The Legislature of West Virginia did not see fit to include religious meetings and services among the nonscholastic uses permitted of school buildings. All religions are treated alike by the statute. None are permitted to use school buildings for religious meetings or services. This is not a violation of the First and Fourteenth Amendments.

This Court held in *State ex rel. McCollum* v. *Board of Education*, (1947) 333 U. S. 203, 92 L. Ed. 649, and *Everson* v. *Board of Education*, (1947) 330 U. S. 1, 91 L. Ed. 711, that the use of tax supported property for religious purposes was barred by the First Amendment and that a state cannot use tax supported public school buildings for the dissemination of religious doctrines, saying:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly,

> participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.' "

To permit religious organizations the use of public school buildings for holding their religious services or for the dissemination of and expounding of their doctrines and beliefs is certainly a use of tax supported school property to aid religious groups spread their faith.

Appellants state that it is immaterial that the Constitution and laws of West Virginia prohibit the use of school buildings for religious purposes. They assert that because The Board of Education has permitted others to use school buildings for religious purposes, it is estopped from asserting that constitutional and statutory provisions prohibit the use of school buildings for such purposes.

This is a novel assertion. In effect it is a contention that a sovereign power may be estopped by the unlawful or *ultra vires* acts of its officers or agents. It must be conceded that the appellees are without power or authority to permit the use of school buildings under their control for religious meetings, since the state court so found. If, as appellants alleged, appellees have permitted such use, they committed an unlawful act. The granting of such permission was an *ultra vires* act. It is a well established principle that a public officer can create no rights against the state or other public authority represented by him by his unlawful or *ultra vires* acts. The public whether exercising its functions as a state or federal government, or through

county, town, or other governmental agency cannot be estopped by unauthorized acts, admissions or conduct on the part of their officers and agents. *State* v. *Chilton*, (1901) 49 W. Va. 453, 39 S. E. 612; *Beckley* v. *Wolford*, (1927) 104 W. Va. 391, 140 S. E. 344; *Vicksburg Railway Company* v. *Dennis*, (1885) 116 U. S. 665, 29 L. Ed. 770; *Utah Power and Light Company* v. *United States*, (1922) 243 U. S. 389, 67 L. Ed. 791.

As pointed out in *Beckley* v. *Wolford*, 104 W. Va. 391, 140 S. E. 344, "If acts of indifferent and recreant public servants could estop the state in the exercise of its sovereignity, in a few years it would so limit its power that it could not exercise the functions of government."

And in *Utah Power and Light Company* v. *United States*, (1922) 243 U. S. 389, 67 L. Ed. 791, the Court said of an asserted estoppel against the United States:

> "On this it is enough to say that the United States is neither bound or estopped by acts of its officers or agents to enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."

If, as the appellants allege, the Board of Education has permitted other religious organizations to hold religious meetings and services in public school building, the granting of such permission is unlawful and exceeds the Board's authority.

The remedy is not mandamus to compel the Board of Education to commit a further unlawful act in favor of the appellants but rather an injunction to prohibit

a further unlawful granting of permission to use public school buildings for unauthorized meetings. The Supreme Court of Appeals of West Virginia has expressly held that an injunction will lie in such a case. In *Herald* v. *Board of Education*, (1901) 65 W. Va. 765, 65 S. E. 102, the state court said:

> " 'The letting of property belonging to a municipal corporation for any unauthorized uses will be enjoined at the suit of resident tax payers; and the use of a school house for religious worship, when not expressly authorized, is held to warrant the granting of an injunction to restrain the officers of the school district for permitting such use at the suit of a tax payer, without his showing special damage, since he is without means of redress at law. School officers may be enjoined from leasing a public school house for the purpose of keeping a private school, and the use of a public school house for private purposes, such as the holding of religious or political meetings, social gatherings and the like, is unauthorized by law and may be restrained at the instance of any party injured thereby.' "

It is respectfully submitted that the judgment of the Supreme Court of Appeals of West Virginia as well as the judgment of the Circuit Court of Kanawha County, West Virginia, rest on an adequate non-federal basis; that the federal questions raised by the appellants were not decided or passed on by the Supreme Court of Appeals of West Virginia; and that a decision on the federal questions raised by appellants was not necessary to a determination of this cause.

It is further submitted that this appeal is not within the jurisdiction of the Court, because it is not taken in

conformity to the provisions of 28 U.S.C.A. 1237(2) and does not present a substantial federal question.

Wherefore, appellees respectfully move that the within appeal be dismissed.

Respectfully submitted,

JOHN O. KIZER
W. M. WOODROE
Counsel for Appellees

FILED
NOV 9 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 438

H. E. WHITE, CHARLES R. HALL, JENNINGS LILLY, W. C. WHITE and JOHN RONCAGLIONE,

Appellants,

vs.

ALBERT ANSON, JR., H. M. BEDDOW, A. S. THOMAS, JR., H. G. KENNEDY and DR. H. R. GLASS, MEMBERS OF THE BOARD OF EDUCATION OF KANAWHA COUNTY, WEST VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

APPELLANTS' REPLY TO MOTION TO DISMISS

HAYDEN C. COVINGTON,

Counsel for Appellants.

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MAY IT PLEASE THE COURT:

Now come the appellants in reply to the motion to dismiss and show the Court as follows:

I.

It is submitted by appellees that appeal is not a proper remedy because mere discriminatory enforcement of the law is alleged and the statute is not attacked. (See pages 3-6 of the motion to dismiss.) An examination of the record

reveals that the allegations were sufficient to show appellants contended that the unequal administration of the law denied them freedom of assembly guaranteed by the First Amendment, contrary to the Fourteenth Amendment.—See the jurisdictional statement at pages 8-11.

The case in this respect is similar to *Martin* v. *Struthers,* 319 U. S. 141 (1943); *Jamison* v. *Texas,* 318 U. S. 413 (1943); *Largent* v. *Texas,* 318 U. S. 418 (1943); *Marsh* v. *Alabama,* 326 U. S. 501 (1946); and *Tucker* v. *Texas* 326 U. S. 517 (1946). But, if the Court reaches the conclusion that the allegations do not constitute an attack on the statute, then the appeal papers should be treated as a petition for writ of certiorari, and as such granted. (43 Stat. 936, 938; 28 U. S. C. § 2103) This was done in *Cantwell* v. *Connecticut,* 309 U. S. 626, 310 U. S. 296 (1940).

II.

It is suggested at pages 13-16 of the motion to dismiss, contrary to the law of West Virginia, that the constitution of that state prohibits religious organizations from using public property for religious meetings. This is not now the law of West Virginia and never has been the law of that state.

The constitutional provision involved is quoted at the top of page 14 of the appellees' motion to dismiss. A reading of the provision fails to show any separation clause and there is nothing in it that implicitly prohibits public property from being used for religious purposes. The West Virginia Constitution provides for the exemption of places of public worship from taxation by the state. Uniformly throughout the state other state property similar to school auditoriums, the National Guard armories and the municipal auditoriums of cities in the state, is used for religious assemblies.—See the exhibits attached to the petition for writ of mandamus.

The Constitution of West Virginia has been interpreted by the state legislature as not prohibiting religious assem-

blies on public property. Section 62 of Chapter 45 of the Barnes Code of 1916 (West Virginia), quoted on page 11 of the motion to dismiss, specifically provided for religious meetings on school property in the state. Had the constitution of the state prohibited it the legislature of the state would not have specifically authorized it by that explicit provision.

The administrative interpretation put on the West Virginia Constitution by the appellees and the other school boards of the state supports the contention here made: that the state constitution does not prohibit religious meetings on school property. Throughout West Virginia it is a common practice of school boards, under the statute in question, to grant permission to various religious organizations to hold religious meetings on school property.

At no time in the history of the judiciary of West Virginia has it been held by any court that the Constitution of West Virginia prohibits religious meetings on school property. The appellee suggests (at pages 13-16) that the courts have so held. But no decision from West Virginia is cited to support the suggestion. *Herald* v. *Board of Education,* 65 W. Va. 765, 767, 65 S. E. 102, is cited and quoted from at page 15. No language of this opinion even intimates such a conclusion. That case did not involve the question. There the school board leased school property conveyed to it for school purposes for oil and gas exploration. The Supreme Court of West Virginia held that the lease was not valid without legislative authority. The dictum quoted from that case on page 15 of the motion to dismiss deals with legislative authority. Nowhere therein does the opinion suggest that the Constitution of West Virginia prohibits the use of school property for religious purposes. This dictum the legislature later met by passing Section 62 of Chapter 45 of the Barnes Code of 1916.

Appellees mention a majority rule of other states construing other state constitutions, which, it is said, condemns religious assemblies on school property. (See pages 14-15.)

The same number of courts, if not more, of other states have reached the opposite results. (See pages 15-16 of the jurisdictiona' statement.) But whatever may be the rule in other states, it is certain that the West Virginia Constitution has not been judicially construed as prohibiting religious assemblies on state property. The legislative and the administrative constructions of the document are that the state constitution does not prohibit such assemblies on such property. The suggestion made by the appellees is, therefore, not correct.

III.

It is contended by appellees that the provisions of the 1931 Code of West Virginia repealed the uses permitted to be made of school property provided by the Barnes Code of 1916. (See pages 6-12 of the motion to dismiss.) A reading of the two different code provisions at pages 10-11 of the motion does not show such an intent. The 1916 Code provided for a limited specified use. A much broader specified use is provided in the 1931 Code without confining the use provided in the earlier code.

Under the present code provisions the school boards still have authority to permit the school auditoriums to be used for religious assemblies, as in the earlier code. The administrative interpretation of the present code by the appellees in letting the property out to all other religious organizations but Jehovah's Witnesses proves the authority.

The present code provisions authorize "the free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities. This part of the 1931 Code has a very broad and general meaning, and there is no suggestion of restriction or limitation. Such authority is broadened further by authorizing the provision of "facilities for dissemination of information useful on the farm, in the home, or in the community."

Matters concerning God, eternal salvation, good morals, fair dealings and upright living, even though springing from religion, are suitable for discussion or study at "frequent meetings and associations of the people." The "dissemination of information" on such subjects is useful "in the home, or in the community."

The use of such broad language in the statute shows an intent, not to limit the types of meetings formerly authorized by the 1916 Code, but to broaden the use of school auditoriums. The 1931 Code did not specifically prohibit religious use of school property. The failure to specify "religious" use and "political" use in the 1931 Code is not equivalent to a prohibition of such use. The 1931 Code merely provided a broad and unlimited discretion in the school boards in authorizing them to say whether or not they would lease out school property for religious and political meetings. The 1931 Code left the scope of the use to be permitted of the school property entirely up to the school boards without any specific grant of use for religious purposes, as did the 1916 Code.

Since the 1931 Code, if the school boards want to let their schools be used for religious purposes, they may do so and it is up to the particular school board. It is no longer the business of the legislature to say what each school shall do. The legislature by not specifying religious and political use in the act intended to leave it to the judgment of each school board by the general terms of the act to say whether or not its property could be used for religious or political meetings. A school under the new statute can keep out all religious meetings. It can keep out all political meetings. Board members, according to their discretion, can allow religious meetings or political meetings or both under the new statute.

Neither the trial judge nor the Supreme Court of Appeals can be said to have definitely decided the case because of a repeal of the uses permitted by the 1916 Code when the 1931 Code was passed. The trial judge said: "This,

however, is debatable." He then added that the matter was uncertain "in the absence of a decision by the Supreme Court of Appeals." He then assumed for purpose of argument that if the statute did permit religious use "the granting of such use rests largely within the discretion of the school authorities."—See the jurisdictional statement at pages 26-27.

The Supreme Court of Appeals did not say on what ground it refused the original application for writ of mandamus. No opinion was written. It may well be that such court refused the writ because of a belief that the discretion of the school board was absolute and that it had the power to permit religious organizations to use the school and the unlimited discretion to discriminate between religious groups in the use of the building. This is itself a federal question.

With no opinion from that court there is nothing now before this Court to guide it in deciding whether the so-called nonfederal question is independent from the federal question of discrimination. If the Supreme Court of Appeals refused the writ, as it may have done, because of the unlimited discretion of the appellees to discriminate against Jehovah's Witnesses and in favor of other religious organizations, as they do, then the so-called nonfederal question in this case is itself a federal question or it is so confused and mixed up with the federal question of discrimination that it is impossible to separate them.

It should be remembered that the order of the Supreme Court of Appeals is not one made upon a review of the decision of the Circuit Court. No appeal was taken from that decision. Under the state practice the denial by the Circuit Court authorized the appellants to file an original application in the Supreme Court of Appeals. Because of the *de novo* and *ex parte* nature of these proceedings in the highest court of the state the case is entirely unlike a judgment affirming without opinion a trial court that wrote an opinion. In such a case the opinion of the trial court

throws some light on the ruling of the highest court. But here the nonfederal reasons stated by the Circuit Court may not have been the reasons of the Supreme Court of Appeals. The failure of the Supreme Court of Appeals to write an opinion should not be made the basis of an affirmative finding by this Court that all or any one of the different nonfederal grounds relied upon by the appellees were relied upon by the highest court of the state in refusing the original application.

It requires speculation by this Court to say that the order of the Supreme Court of Appeals rests exclusively on one or all of such grounds. It is equally fair to speculate that the highest court of the state relied upon the ground of absolute unreviewable discretion to discriminate between religious organizations—itself also a federal question. The right to exercise discretion is mentioned in the opinion of the Circuit Court.—See the jurisdictional statement at page 27.

In the face of the record the doubt should be resolved in favor of appellants. This Court should, therefore, conclude that the order appealed from does not rest on an adequate and wholly independent nonfederal ground. This Court has said that "it will be presumed that the State Court based its judgment on the law raising the Federal question, and this court will then take jurisdiction."—*Klinger* v. *Missouri,* 13 Wall. 257, 263 (1871); *Williams* v. *Kaiser,* 323 U. S. 471, 477 (1944); and *Nielson* v. *Lagow,* 12 How. 98, 110 (1851).

In *Williams* v. *Kaiser,* 323 U. S. 471 (1944) (dictum quoted from by appellees at page 18 of the motion to dismiss), the facts are identical with the facts in this case insofar as the nonfederal question is concerned. There the petitioner got his petition for habeas corpus in the Supreme Court of Missouri dismissed without a hearing. It was contended, as it is here, that petitioner failed to state a cause of action. The Supreme Court of Appeals in this case entered its final order dismissing the petitioner

because it was "plainly right" to do so. The petition in the *Williams* case, as in this case, alleged the unconstitutional denial of a federal right. The Court in that case refused to dismiss because of a nonfederal question. The same ruling on the jurisdictional question in this case should be made here.

The decision of the court below is not sufficiently "broad to maintain the judgment" below without reference to the federal question of discrimination. (*Murdock* v. *Memphis,* 20 Wall. 590, 636 (1873); *Hale* v. *Akers,* 132 U. S. 554, 564-565 (1889)) The so-called nonfederal question of discretion to say who shall use the school auditorium in this case is so "intermingled with that of Federal right that the former cannot be considered as an independent matter." (*Moral* v. *Horsky,* 178 U. S. 205, 208 (1900); *Bacon* v. *Texas,* 163 U. S. 207, 226-228 (1896)) This confusion of the federal question of unequal administration of the law with the state question is such as "to make it necessary, in order to pass upon the Federal question, to analyze the facts." —*Fiske* v. *Kansas,* 274 U. S. 380, 385-386 (1927).

Assume that this Court concludes that the ambiguity as to the likely grounds of the decision by the Supreme Court of Appeals will remain after the case has been taken in for review and that this Court does not desire to resolve the ambiguity, then this Court should vacate the order appealed from and remand the case back to the Supreme Court of Appeals for further consideration and clarification of the reasons for its final order when it said "plainly right."—*Minnesota* v. *National Tea Co.,* 309 U. S. 551 (1940); *State Tax Commission* v. *Van Cott,* 306 U. S. 511 (1939); *Chicago* v. *Willett Co.,* 341 U. S. 913 (1951); but compare *Dixon* v. *Duffey,* 344 U. S. 143 (1952), at page 147.

CONCLUSION

It is respectfully submitted that this Court should note jurisdiction in this case or consider the appeal papers as

a petition for writ of certiorari and grant the writ, unless the Court cannot resolve the ambiguity of the decision of the court below as to the adequacy of the nonfederal question; in which event the order ought to be vacated and the case remanded to the court below for further consideration and clarification of its final order.

Respectfully,

HAYDEN C. COVINGTON,

Counsel for Appellants.

November, 1955.